

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

Maurio Rivers,

Plaintiff,

V.

Joe Burnette and Tim Knight,

**Defendants.**

No. 4:13-cv-1914-RMG

## ORDER

This matter is before the Court on the Report and Recommendation of the Magistrate Judge (“R&R”) and Defendants’ motion to supplement the record. (Dkt. Nos. 44, 48). For the reasons set forth below, the Court grants the motion to supplement the record and recommits this matter to the Magistrate Judge for further proceedings.

## Background

Plaintiff, a state prisoner proceeding pro se, brings this action under 42 U.S.C. § 1983 for alleged excessive force during his arrest. Pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(e) DSC, this matter was automatically referred to a United States Magistrate Judge for pretrial handling. On December 2, 2013, Defendants filed a motion for summary judgment. (Dkt. No. 33). Plaintiff then filed a response in opposition to the motion. (Dkt. No. 42). The Magistrate Judge then issued an R&R recommending the Court deny the motion for summary judgment. (Dkt. No. 44). Defendants then filed timely objections to the R&R, (Dkt. No. 47), and a motion to supplement the record to include a video tape of the incident giving rise to this action. (Dkt. No. 48). The Court then entered an order stating:

Following issuance of the Magistrate Judge's [R&R], Defendants filed timely objections (Dkt. No. 47) and a motion to supplement the record to include a video tape of the events giving rise to this action, (Dkt. No. 48). While the Court has discretion to accept further evidence, 28 U.S.C. § 636(b)(1), attempts to

supplement the record after the Magistrate Judge has acted are disfavored. *Caldwell v. Jackson*, 831 F. Supp. 2d 911, 914 (M.D.N.C. 2010). “In appropriate cases, however, the district court may exercise its discretion and accept further evidence when a party offers sufficient reasons for so doing.” *Id.* (citing 12 Wright, Miller & Marcus, Fed. Prac. & Proc. § 3070.2, at 378 (2d ed. 1997)). Defendants are hereby ordered to file with the Court, within five days of this order, their reasons for failing to present the video tape to the Magistrate Judge. Plaintiff will then have ten days from the date of Defendants’ filing to respond.

(Dkt. No. 51). Defendants subsequently filed a memorandum in accordance with the Court’s order. (Dkt. No. 55). Plaintiff did not file a timely response to Defendants’ memorandum.

### **Legal Standard**

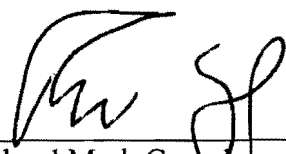
The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). This Court is charged with making a de novo determination of those portions of the R&R to which specific objection is made. Additionally, the Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). This Court may also “receive further evidence or recommit the matter to the magistrate judge with instructions.” *Id.*

### **Discussion**

In their response to the Court’s order regarding the motion to supplement the record, Defendants state that they did not initially include the video tape as evidence in support of their motion for summary judgment because the video is formatted in an uncommon file type and because it would be difficult to share with Plaintiff, a prisoner. (Dkt. No. 55). The Court will exercise its discretion in this instance to allow Defendants to supplement the record to include the video. Defendants are directed to make a copy of the video available for viewing by the Plaintiff within fifteen days of this order.

Further, because the evidence before the Court has changed, the Court declines to adopt the R&R of the Magistrate Judge, (Dkt. No. 44), denies the current motion for summary judgment as moot, (Dkt. No. 33), and recommits this matter to the Magistrate Judge for further proceedings to include renewed motions for summary judgment. The Magistrate Judge should instruct the parties on a briefing schedule for such dispositive motions while providing sufficient time for Plaintiff to review the new evidence.

**AND IT IS SO ORDERED.**

  
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Richard Mark Gerge  
United States District Court Judge

April 30 2014  
Charleston, South Carolina